

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

ORIGINAL

77-1216

IN THE
**United States Court of Appeals
For The Second Circuit**

UNITED STATES OF AMERICA,

Appellee.

against

CHAIM KAHAN, SOLOMON WERCBERGER and
MOR WERCBERGER,

Defendants-Appellants.

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING, AND SUGGESTION FOR
REHEARING IN BANC, ON BEHALF OF
DEFENDANTS-APPELLANTS CHAIM KAHAN, SOLOMON
WERCBERGER AND MOR WERCBERGER

SHEA GOULD CLIMENKO & CASEY
Attorneys for Defendants-Appellants
330 Madison Avenue
New York, New York 10017
(212) 661-3200

Of Counsel:

MILTON S. GOULD
RONALD H. ALENSTEIN
LAURENCE B. SUTTER

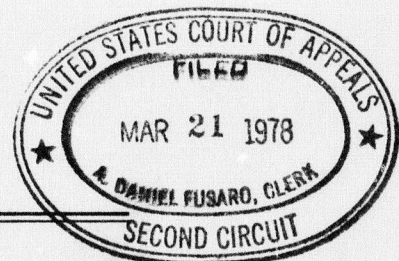


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1216

UNITED STATES OF AMERICA,

Appellee,

- against -

CHAIM KAHAN, SOLOMON WERCBERGER
and MOR WERCBERGER,

Defendants-Appellants.

PETITION FOR REHEARING, AND SUG-
GESTION FOR REHEARING IN BANC, ON
BEHALF OF DEFENDANTS-APPELLANTS
CHAIM KAHAN, SOLOMON WERCBERGER
AND MOR WERCBERGER

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT:

PETITION FOR REHEARING

Defendants-Appellants Chaim Kahan, Solomon Werc-
berger and Mor Wercberger respectfully petition this Court,
pursuant to Rule 40, F.R.App.P., for rehearing of its

decision filed herein March 7, 1978, affirming (2-0) their convictions on one count of knowingly possessing goods stolen in interstate commerce, and assert the following:

1. The opinion herein was delivered by District Judge Dooling, of the Eastern District of New York, sitting by designation, and was joined in by Circuit Judge Van Graafeiland. Circuit Judge Webster, of the Eighth Circuit, sitting by designation, heard oral argument but resigned before the opinion was rendered (op. at 1a).

2. In the opinion of the petitioners, the opinion overlooked or misapprehended [F.R.App.P. 40(a)] the import and effect of this Court's holding in United States v. Karathanos, 531 F.2d 26 (2d Cir.), cert. den., 428 U.S. 910 (1976), and the test therein set forth (id. at 29-31) for the sufficiency of an affidavit in support of a search warrant based upon an informer's "tip." Specifically, it is believed the opinion over

(a) the complete of any allegation or statement by the informer recited in the affidavit of Agent Colgan (134a-135a; * Appellee's Br. at 33-34, n. 27) that

*Page references followed by "a" refer to pages of Appellant's Appendix on this appeal.

he knew or had reason to know the goods observed by him were stolen, or the basis for any such belief;

(b) that another panel of this Court had, subsequent to the decision in Karathanos, stated that an affidavit identical in every relevant aspect to the affidavit in this case was invalid, and "does not meet the Karathanos test." United States v. Galante, 547 F.2d 733, 736, n. 1 (2d Cir., 1976). (See paragraph "5" below.)

3. After reciting that the affidavit contained (A) a statement by the truckdriver that certain Schick products had been hijacked from his truck on March 11, 1975, and (B) a statement that a reliable informant had stated that on March 12, 1975, he observed several thousand cartons of Schick products within Appellants' warehouse, the opinion states (Slip op., pp. 12-13):

"United States v. Karathanos, 2d Cir. 1976, 531 F.2d 26, does not point to a different conclusion. The seemingly small but, as the majority found, critically important defect in the affidavit was that the informer's statement to the affiant omitted to say how the informer learned (rather than surmised) that the aliens with whom he had been living and working had entered the country illegally: that is, the affidavit would have been sufficient if the affiant had said that the informer said that at least eight other persons working at the restaurant told him that they were illegal aliens rather than saying that the informer had said that 'eight other persons known to him to be illegal aliens were employed at' the restaurant (531 F.2d at 30). The difference was precisely that between empty opinion and competent evidence. Cf. Spinelli v. United States, 1969, 396 U.S.

410, 418, 423 (concurring opinion). Here the affiant recited as the basis of the informer's statement the informer's presence in the warehouse and his observation of the Schick products; these factors made the informer a competent witness of the facts he reported. See Spinelli v. United States, supra, 393 U.S. at 419."

It is respectfully urged that:

(a) The "fact" found missing by the Karathanos Court was the fact of illegality. Here, the "fact" recited by the informer was the fact that certain goods were in appellant's warehouse. But here, as in Karathanos, the "fact" of illegality is not set forth. There is no allegation that the goods were those which had been stolen, either from the Time D.C. driver whose evidence was set forth in the first paragraph of the affidavit, nor, indeed, from anyone else. Nor is there any stated basis for such allegation even if it could be read in.

(b) The Karathanos decision construed the requirements of Spinelli v. United States, 393 U.S. 410 (1969), and Aguilar v. Texas, 378 U.S. 108 (1964) that the magistrate be given evidence sufficient to satisfy a "reasonably prudent detached and neutral person" (United States v. Karathanos, supra at p. 30) that "the informant's information" is reliable, id., (emphasis supplied). Again, the "information" herein, upon which the issuance of the warrant could have turned, was not that the informant saw goods,

or even Schick goods, in appellants' warehouse, but that he saw stolen Schick goods therein. Such a recitation, even in the impermissibly conclusory form proscribed by Karathanos, does not appear in the Colgan affidavit.

4. The opinion states (at p. 11):

"The affidavit is sufficient if it is read as saying that the informant saw in the CBS warehouse the same cartons that the Time D.C. driver had reported stolen from his truck on the preceding day."

The opinion then cites United States v. Ventresca, 380 U.S. 102 (1965) for the proposition that affidavits must be read "in a common sense way, rather than technically," id. at 109, and that the Magistrate, as well as the informer and the affiant, had nothing before them "to make them suspicious that the description lacked ultimate specificity." Slip op. at 11.

With respect, petitioners urge:

(a) that the opinion here misapprehended or overlooked the express admonition and holding of Karathanos, specifically citing and distinguishing Ventresca, that an affidavit which requires the Magistrate "or the reviewing court to use imagination to supply essential details critical to determining probable cause," is invalid. 521 F.2d at 31. It is respectfully submitted that the goods' illegal character was the sole "determining" factor which would have permitted a finding of probable cause, and that the face of

the affidavit shows that the Magistrate could not conclude that the goods seen by the informant were stolen unless he, the Magistrate, supplied this missing detail.

(b) that the conclusion attributed to the Magistrate that the Schick goods stolen and those seen were the same is equally prohibited by Karathanos, and that the opinion herein overlooked or misapprehended the fact that no evidence of such identity appears from the affidavit.

5. Petitioners believe the opinion misapprehended or overlooked the statement by another panel of this Court, in United States v. Galante, 547 F.2d 733, 736 n. 1 (2d Cir. 1976) that an almost identical affidavit, sworn to within a month of the affidavit herein, was insufficient under Karathanos. The footnote in Galante cited above, in its entirety (which includes the text of the affidavit found wanting) is as follows:

"The grounds alleged for insufficiency were that the affidavit, which described a tip from an informant, did not set out probable cause to believe a crime had been committed. In full, the affidavit stated:

'CHARLES K. BOLING, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

'Your deponent has reason to believe that there is presently being concealed in the above-described premises a quantity of cartons bearing the name Nikkor

Camera Lens which cartons have been stolen from foreign commerce in violation of Title 18, United States Code, Section 659.

'The facts tending to establish the grounds for the issuance for a search warrant for the above-described premises are as follows:

'(1) A communication to the Federal Bureau of Investigation from a Mr. Dennis Mooney, an employee of the Greenpoint Terminal Warehouse, Inc., 40 Noble Street, Brooklyn, New York, that on March 22, 1975 the warehouse had been entered and a quantity of cartons containing Nikkor Camera Lens had been stolen. Mr. Mooney further advised that the camera lens above-mentioned had been shipped by Nippon Kogaku, Inc., of Japan to Ehren Riech Photo, Inc., of 623 Stewart Avenue, Garden City, New York, and being held at the Greenpoint Terminal Warehouse under United States Customs Bond Numbers: B 255 776, B 257 313, B 231 030.

'(2) A reliable confidential informant, who has previously supplied information to the Federal Bureau of Investigation which information has resulted in the arrest of six individuals in both the Eastern and Southern District of New York for the theft of approximately Two Hundred and Fifty Thousand Dollars (\$250,000) worth of stolen merchandise, which arrests have resulted in two convictions, has stated that he was in the above-described premises known as Bristol Bargain Fair, Inc., on April 7, 1975. While in the above-described premises the reliable informant observed the Nikkor Camera Lens as well as Precor Radios and APF Scientific Calculators that were stolen from the Greenpoint Terminal Warehouse on March 22, 1975.'

"Judge Judd held that a common sense reading of the affidavit established the 'reliability' required by Aguilar v. Texas . . . and Spinelli v. United States Subsequent to the district court finding, however, this Court rendered its decision in United States v. Karathanos In Karathanos, we held that Aguilar and Spinelli require that an affidavit based upon an informant's tip must set forth the basis upon which the informant believes the activity to be criminal.

Although this affidavit shows an obvious attempt to comply with the reliability requirement, it does not meet the Karathanos test. Thus, if Karathanos is to be retroactively applied, this search was conducted under an invalid warrant, a point conceded by the government."

The affidavit herein reads, in its entirety, as follows (134a-135a; Appellee's Br. pp. 33-34, n. 27):

"Patrick F. Colgan, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation duly appointed according to law and acting as such.

"Your deponent has reason to believe that there is presently being concealed in the above-described premises a quantity of cartons bearing the name Schnick [sic] Inc., with the Spec No. 02-40 on the said cartons which cartons have been stolen from Interstate Commerce in violation of Title 18, United States Code, Section 659.

"The facts tending to establish the grounds for the issuance for a search warrant for the above-described premises are as follows:

"(1) A communication to the Federal Bureau of Investigation from a Mr. James Lester, an employee of Time-D.C. Trucking Corp., of Secaucus, New Jersey, that a trailer owned and operated by Time-D.C. Trucking Corp., and bearing California License Plate No.: WY6336 was hi-jacked on March 11, 1975. Mr. Lester further advised taking from the trailer 6,910 cartons of Schnick [sic] razors and toilet products which cartons were being shipped from the Schnick, [sic] Inc., West Haven Conn. to Anaheim, California.

"(2) A reliable confidential informant, who has previously supplied information to the Federal Bureau of Investigation which information has resulted in the arrest of one individual for the theft of approximately Seventy-Five Thousand Dollars (\$75,000) worth of stolen merchandise and who's [sic] information has also lead to the recovery of

approximately Twenty-Five Thousand Dollars (\$25,000) worth of hijacked property and the arrest of two individuals in connection with that hijacking has stated, that he was in the above-described premises known as CBS Warehouse on March 12, 1975. While in the above-described warehouse the reliable informant observed several thousand cartons of Schnick [sic] super two bonded razors bearing the Schnick, [sic] Inc., Spec No. 02-40 on the cartons.

"WHEREFORE, your deponent respectfully [sic] requests that a search warrant be issued authorizing Special Agents of the Federal Bureau of Investigation to enter in day the premises known as CBS WAREHOUSE, INC., A MULTI-STORY RED BRICK BUILDING KNOWN AS BUILDING NO. 58 LOCATED AT THE FOOT OF 50TH STREET, BROOKLYN, NEW YORK, and there to search and seize the above-described property to the end that the same may be dealt with according to law."

The affidavit upheld in the case at bar and the affidavit viewed as invalid in Galante are identical in all material respects. The only difference in the Galante affidavit is that the informant therein stated that the goods he saw were stolen. Not even that minimal attempt to demonstrate probable cause was present in the affidavit here.

SUGGESTION FOR REHEARING IN BANC

Petitioners respectfully suggest, pursuant to Rule 35, F.R.App.P., that a rehearing in banc is proper and warranted in this case.

1. Under Rule 35(a), F.R.App.P., a rehearing in banc may be ordered "(1) when consideration by the full court is necessary to secure or maintain uniformity of its

decisions, or (2) when the proceeding involves a question of exceptional importance." Petitioners respectfully urge that the questions presented on this appeal are of exceptional importance, and that consideration by the full Court is necessary to secure uniformity of its decisions.

2. Petitioners respectfully suggest that the question is one of exceptional importance because it addresses the Fourth Amendment right of freedom from unreasonable searches by government agents. The standard of United States v. Karathanos, supra, assured that informers' "tips" could not be the basis for such intrusions unless the information clearly showed the informers' knowledge of criminal activity, thus safeguarding the rights of citizens against searches and seizures based on speculation, rumor, or, as in this case, insufficient information. Petitioners believe the decision herein has nullified the Karathanos standard and thus endangered the rights of citizens in this Circuit.

3. Petitioners respectfully suggest that rehearing in banc is necessary to secure uniformity in the decisions of this Court, because the decision herein conflicts with that in United States v. Karathanos, supra, 531 F.2d 26 (2d Cir.), cert. den., 428 U.S. 910 (1976) and with the statement of this Court, referred to above, in

United States v. Galante, supra, 657 F.2d 733 (2d Cir. 1976). The Karathanos case was decided by a panel of this Court consisting of Judges Mansfield, Oakes and Van Graafeiland. Judge Oakes joined in the majority opinion written by Judge Mansfield. Judge Van Graafeiland dissented. The panel in Galante was unanimous, and consisted of Chief Judge Kaufman and Judges Mansfield and Meskill. Chief Judge Kaufman wrote a concurring opinion on another point, but joined with the majority on the question of the sufficiency of the affidavit. Of these five judges in active service, only Judge Van Graafeiland sat both in this case and Karathanos, where he vigorously dissented. We submit, with respect, that the dissenting views of Judge Van Graafeiland (United States v. Karathanos, supra, at 36-37) have now become the law of this Circuit, at least as announced in the present case. Had another panel been chosen, it is possible this appeal would have been decided differently. We respectfully suggest that consideration by the full Court is especially warranted where what has previously been a minority view becomes official doctrine of the Circuit only two years later by reason of what may be no more than an accident of panel selection.

4. Rehearing in banc is also necessary, petitioners suggest, in order to ensure that the doctrines

announced in this case represent the views of those Judges of this Court who are responsible for the development of the law in this Circuit. Under Rule 35, F.R.App.P., a suggestion for rehearing in banc is acted upon only by the circuit judges who are in "regular active service." And under 27 U.S.C. § 46(c), "[a] court in banc shall consist of all circuit judges in regular active service." As the Supreme Court said in United States v. American-Foreign Steamship Corp., 363 U.S. 685, 689 (1960),

"They [in banc courts] are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit."

The Court also quoted (p. 690) from the dissenting opinion of Judge Clark of this Court in the same case for the proposition that in banc courts are convened so that "'the active circuit judge shall determine the major doctrinal trends of the future for their court . . .'" 265 F.2d, at 155."

5. As noted above, the only Circuit Judge to sit on both this case and in Karathanos dissented in Karathanos and concurred herein. The panel herein, because of the resignation of Judge Webster (also not a judge of this Circuit) was composed of only two judges,

one of whom was a District Judge sitting by designation. With no disrespect intended to either Judge Dooling or Judge Van Graafeiland, it is respectfully urged that the decision of the two-judge panel in this case may not necessarily represent the views of the "circuit judges who are in regular active service" and who are "charged with the . . . development of the law of the circuit" and with the determination of the "major doctrinal trends of the future" for this Court.

WHEREFORE, petitioner respectfully requests rehearing of the decision herein, and respectfully suggests rehearing by this Court in banc.

SHEA GOULD CLIMENKO & CASEY
Attorneys for Defendants-Appellants
Chaim Kahan, Solomon Werberger
and Mor Werberger
330 Madison Avenue
New York, New York 10017

(212) 661-3200

Milton S. Gould
Ronald H. Alenstein
Laurence B. Sutter

Of Counsel

Service of three (3) copies of the within
is admitted this 21st day of March 1975

UNITED STATES ATTORNEY
MAR 21 2 43 PM '75
JAMES H. HARRIS